No. 84-1539

In The
Supreme Court of the United States
October Term, 1984

STATE OF MICHIGAN,

Petitioner,

v.

RUDY BLADEL,

Respondent.

BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED March 28, 1985
CERTIORARI GRANTED May 28, 1985

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QUESTIONS PRESENTED

Rudy Bladel was convicted by jury trial for the murders of three individuals. Admitted at trial was a statement made by Respondent during custodial interrogation. The interrogation occurred after arraignment in the State District Court wherein Respondent requested court appointed counsel. Respondent was advised of and waived his "Miranda Rights" prior to making the statement. The Michigan Supreme Court found that the interrogation violated Respondent's Sixth Amendment right to counsel and reversed the convictions. The questions presented are:

1. Whether the Michigan Supreme Court erred when it held that police interrogation of a criminal defendant after District Court arraignment was a critical state in the proceedings such that the Sixth Amendment right to the presence of counsel is applicable?

2. Whether the Michigan Supreme Court erred in holding that the Sixth Amendment of the United States Constitution requires a "bright line" rule prohibiting police initiated interrogation after a criminal defendant has requested appointment of counsel at initial arraignment?

3. Whether the interests protected by the Sixth Amendment right to counsel and the "Fifth Amendment right to Counsel" during interrogation are sufficiently similar such that a knowing and intelligent waiver of Fifth Amendment "standard Miranda Rights" also constitutes a knowing and intelligent waiver of a criminal defendant's then existing Sixth Amendment rights?

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OPINIONS BELOW

The Opinion of the Michigan Supreme Court is published at 421 Mich 79; 365 NW2d 56 (1985). The Michigan Supreme Court's prior remand order is published at 413 Mich 864; 317 NW2d 855 (1982). The Opinions of the Michigan Court of Appeals are published at 106 Mich App 397; 308 NW2d 230 (1981) and 118 Mich App 498; 325 NW2d 421 (1982). The Opinion of the Circuit Court was neither published nor written, but is contained in the Joint Appendix pp 114a-115a.

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JURISDICTION

The judgment of the Michigan Supreme Court was released on January 29, 1985. The Petition was filed less than 60 days from the date aforesaid. The Petition was granted on May 28, 1985. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

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CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel in his defence."

Constitution of the United States, Amendment XIV, Section 1:

> " . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

Respondent was convicted of the December 31, 1978 shotgun slayings of three railroad employees at the train depot in Jackson, Michigan. Respondent, a prime suspect in the slayings, was questioned by the police on January 1, 1979 and January 2, 1979. Before each interview Respondent was advised of his "Miranda rights" which he waived each time. (JA 12a, 15a, 17a R 528, 532). During the first interview Respondent admitted that he was present in Jackson on December 31. (JA 16a R 530). In the second interview he admitted that he had gone into the train depot on the day of the murders, but did not admit any involvement in the murders. (JA 18a-21a R 533-537).

There was no further police contact with Respondent until March of 1979 when a shotgun was found on the outskirts of Jackson and was scientifically determined to be the murder weapon. Federal firearms records showed that Respondent had purchased the shotgun in Indiana. (R 538). A warrant was issued for the arrest of Respondent. He was arrested in Elkhart, Indiana on March 22, 1979. (JA 22a). Respondent waived extradition from Indiana. (R 539, JA 29a-30a). During the waiver hearing, Respondent was advised of, but declined, the right to representation by counsel. (R 539, 572, 683-684, JA 29a-30a).

Respondent was not questioned about the crime until he arrived back in Jackson on the 22nd. That evening, from 9:21 p.m. until 10:47 p.m. Respondent was interviewed by Jackson Police. (R 540-575). Prior to this interview, Respondent was advised of his rights including his right to consult a lawyer before answering any questions, to have a lawyer present during questioning, the

right to have an attorney appointed and an absolute right to stop the questioning at any time. (R 541-542, JA 22a-26a). Detective Rand also read to Respondent a written rights form which Respondent also read. Respondent signed the acknowledgment and waiver portion of the advice of rights form (indicating that he would talk to the police) and waiving the presence of an attorney. (R 542, JA 26a). This questioning was terminated when Respondent failed to answer any further questions. (R 545, JA 28a).

The Respondent was arraigned in District Court on March 23, 1979, at about 10:35 a.m., in the presence of Detective Rand. (JA 2a). The pertinent events at arraignment are recorded as follows:

THE COURT: Now, because these are very serious charges which are brought against you, have a right to be represented by an attorney, at all stages of the proceedings, including the preliminary examination I just mentioned. If you want one. If you cannot afford an attorney, then you may petition the Circuit Judge of this County for the appointment of an attorney to represent you at public expense. Now my first question to you is this. Do you intend to retain your own attorney?

THE DEFENDANT: I don't have the money.

THE COURT: Do you wish to have one appointed for you?

THE DEFENDANT: Yes, sir.

THE COURT: All right sir. I'll place an affidavit in the file for you to make

> out for that purpose. Until you have a chance to talk with an attorney, the Court would strongly recommend that you stand mute, that means say nothing. If you do this, the Court will enter a plea of not guilty for you and set the matter for preliminary examination. Is that what you wish to do?
>
> THE DEFENDANT: Right sir.
>
> (JA 3a-4a).

On March 26, 1979, Sergeant Richard Wheeler and Lieutenant Ronald Lowe interviewed the Respondent in the County Jail. (R 589, JA 39a). The Respondent was given a copy of an advice of rights form to read while Wheeler read another copy to Respondent. (JA 40a). The Respondent was advised of each right individually. (JA 40a-41a). He responded affirmatively when asked if he understood each right. (JA 40a-41a). Respondent was then read the waiver portion of the form, which he indicated he understood. Respondent signed the waiver and said he did not want an attorney present at that time. (JA 41a). At no time during the interview did the Respondent ask to have any attorney present or to contact an attorney. (JA 43a). Neither Wheeler nor Lowe were aware of Respondent's request for appointment of counsel made at arraignment until Respondent told them at the point during the advice of rights when counsel is mentioned. (JA 47a-48a). Respondent was then specifically asked if he wanted an attorney present at that time and the Respondent stated, "No." (JA 49a). Wheeler testified that when the Respondent mentioned that he had asked for court appointed counsel Wheeler asked Respondent

if he wanted an attorney present, to which Respondent replied, "I do not need one." (JA 52a). Lieutenant Lowe testified to this recollection of the events:

> Mr. Bladel at that time stated that he had requested an attorney at his arraignment, but he hadn't seen him, seen the attorney yet, but he would talk to us, and he said he would talk to us, and he said he didn't need his attorney there while he was talking to us. (JA 55a).
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> Q. Was there any mention of an attorney at this time?
>
> A. I asked him if he desired his attorney present and he stated he did not need one.
>
> Q. What, if anything, further took place then?
>
> A. In addition to the last statement that Mr. Bladel said, when I asked him if he needed his attorney present he stated, 'I don't need him present. I'm going to plead guilty anyway.' (JA 62a).

During this interview, Respondent confessed to the three murders, orally and in writing.

Respondent did not have any contact with his attorney until the day after his confession. (JA 76a). In addition to the times he was advised of his rights in connection with this case, Respondent had been advised of his rights previously and was aware of his rights from this past experience. (JA 80a).

After hearing the testimony at the *Walker* hearing, the trial court found the confession admissible:

> Now I understand the position of the Defendant to the effect that he did demand counsel on March 23 at his arraignment in District Court. Now, whether or not counsel was appointed by March 26, incident-

ly March 23, 1979 was a Friday and March 26, 1979 was a Monday, and, whether or not counsel had been appointed and had an opportunity to consult with the defendant before the interrogation does effect the voluntariness and the effectiveness of the waiver of the rights.

Now, I don't know of any case why (sic) counsel had been appointed but hadn't had a chance to consult with the defendant before he was again interrogated and didn't have a chance to either advise the defendant that he should not say anything without the presence of counsel. But, there is no case that I know of that says *Miranda* goes that far so the holding is that the testimony or the substance of the statements of all three occasions and the confessions will be admissible. (JA 114a-115a).

The Michigan Court of Appeals affirmed following the reasoning of the Fifth Circuit cases of *Nash v Estelle,* 597 F2d 513 (5th Cir 1979) and *Blasingame v Estelle,* 604 F2d 893 (5th Cir 1979). *People v Bladel,* 106 Mich App 397; 308 NW2d 230 (1981). The Michigan Supreme Court, in lieu of granting Respondent's Application for Leave to Appeal, remanded to the Court of Appeals for reconsideration in light of *People v Paintman* and *People v Conklin,* 412 Mich 518; 315 NW2d 418 (1982), decided in the interim, which adopted this Court's holding in *Edwards v Arizona,* infra. *People v Bladel,* 413 Mich 864; 317 NW2d 855 (1982). On remand, the Court of Appeals summarily reversed concluding that *Paintman* and *Conklin* supra, read in light of the remand order "compelled" reversal. *People v Bladel,* 118 Mich App 498; 325 NW2d 421 (1982).

The Michigan Supreme Court granted Petitioners Application for Leave to Appeal on the issue that the confession in the instant case was not taken in violation of Respondent's Fifth Amendment rights. The Michigan Supreme Court agreed that Respondent's Fifth Amendment rights were not violated, but held that Respondent's Sixth Amendment rights were violated by police-initiated interrogation after Respondent had requested court appointed counsel at his initial arraignment. The Court concluded that the Sixth Amendment precludes further police-initiated interrogation after a request for counsel is made to a judicial officer by "analogy" to this Court's case of *Edwards v Arizona* infra, which requires such preclusion under the Fifth Amendment where the defendant requests counsel during custodial interrogation.

SUMMARY OF ARGUMENT

Respondent's confession was properly admitted at trial. Prior to his confession, Respondent was advised of his rights by way of "Miranda Warnings". Respondent indicated he understood his rights, including the right to the presence of counsel, and he signed a waiver of those rights. There was no physical or psychological compulsion used to obtain Respondent's confession. There was no violation of Respondent's Fifth Amendment rights.

Police-initiated interrogation was not prohibited even though Respondent had requested appointment of counsel at his District Court arraignment which preceded the interrogation. *Edwards v Arizona,* 451 US 477 (1981) prohibits police-initiated interrogation after a criminal defendant has invoked his right to the presence of counsel during interrogation. Respondent's request for appointment of counsel, under the facts of this case, related only

to representation during judicial proceedings. Therefore, further police-initiated interrogation could not badger Respondent into unwillingly relinquishing a right previously asserted and *Edwards* was not violated.

At the time of the challenged interrogation, Respondent had only been arraigned in District Court which had no jurisdiction to render a final determination of guilt. Therefore, no critical stage of the proceeding had been reached and Respondent's Sixth Amendment rights had neither attached nor could they have been violated.

If Respondent's Sixth Amendment rights had attached, those rights were waived prior to the counselless interrogation. As concerns pre-trial interrogation, the scope of the Sixth Amendment right to counsel is the same as the Fifth Amendment - Miranda right to counsel. The voluntary waiver of the right to the presence of counsel after Miranda warnings sufficed as a waiver of whatever right to counsel Respondent enjoyed at that moment regardless of the Constitutional source of that right.

There is no reason to create an *Edwards* type rule to preclude police-initiated interrogation after a request for appointment of counsel at initial arraignment where that request does not indicate a desire to deal with police only through counsel. Criminal defendants may well want the aid of counsel during judicial proceedings yet still desire to confess to police. Police-initiated interrogation does not risk unwilling relinquishment of a right previously invoked because the right to the presence of counsel during interrogation had not been invoked by Respondent's request for appointment of counsel. Society's interest in prompt and efficient law enforcement is advanced by allowing such interrogation. The burden placed on the criminal defendant is minimal; he need only invoke his right to the presence of counsel when he is asked, before interrogation, if he is willing to waive that right. Post-initial arraignment police-initiated interrogation should be allowed.

Unlike this court's "bright line" cases which are designed to clarify the constitutional constraints on police activity, a rule prohibiting police-initiated interrogation after a request for counsel at arraignment only obscures. "Bright line" cases share the common elements of police presence at the event and control of the situation. Police are not always present and are never in control of arraignment procedures. To control police conduct in accordance with events they may not observe, or procedures they do not control and the significance of which they may be uncertain, would not only give little guidance, but would significantly increase the risk that reliable confessions would be suppressed because the constable bungled. Such a rule would engender disrespect for the law and the administration of justice and thus, should not be adopted by this court.

ARGUMENT

Before becoming enmeshed in the Constitutional questions presented by this case, it is important that the analytical place of beginning be established. Just as the traveler must first plot his own location so that he can properly set his azimuth for his destination, the would-be

constitutional sojourner must firmly place his feet on the bedrock of the Constitution with eyes firmly fixed on the path of justice which our system demands.

That portion of the constitutional foundation upon which the analysis of the present questions must be built is the cornerstone at which the interests of society over against those of the individual intersect and are balanced. The founding Fathers recognized that, in the society they were building, neither the interests of society nor the individual could dominate to the exclusion of the other. The Constitutional Convention in its letter to Congress of September 17, 1787 recognized the challenge of establishing balances between individual and societal rights and their similarity to the balancing of Federal and State interests. The Convention wrote:

> —individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstances as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; . . .[1]

The balance of the competing individual and societal interests embodied within the Constitution is a composite of the multifarious ideologies which composed the colonial mind and found harmony in the theme of liberty.[2] This concept of ordered liberty rejected both the anonymity of

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[1]Clinton Rositer, *The Grand Convention,* The New American Library, Inc. New York, New York, 1966 Pages 342-343.

[2]Clinton Rositer, *The First American Revolution,* Harcourt, Brace, & World, Inc., 1956, Pages 188-191.

the individual characteristic of monarchical and aristocratic government and exultation of the individual found in anarchy and even to some degree in our own Articles of Confederation.

Equally important to the establishment of constitutional principles was the colonial view of the nature of Man which was a matter of considerable controversy.[3] Despite the areas of disagreement, the general impact of the Enlightenment prompted a high view of Man. Metaphysically, Man was viewed as both rational and free, thus, as a free moral agent, responsible for his actions. This view of Man is fundamental to our criminal justice system which establishes a standard of behavior and authorizes society at large to punish the individual for failure to attain that standard.

Despite the fact that the foundational balance between individual and societal rights has already been established by the framers of the Constitution, this court has been regularly called upon to engage in the balancing of interests between the rights of society and the criminal defendant. As the late Chief Justice Warren stated in *Spano v New York,* 306 US 315; 315-316 (1959):

> As in all such cases, we are forced to resolve the conflict between two fundamental interests of society; its interests in prompt and efficient law enforcement, and its interests in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement.

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[3]Clinton Rositer, *The Political Thought of the American Revolution,* Harcourt, Brace & World, Inc., New York, 1963, Pages 95-114.

It is apparent from the quotation from *Spano* that this court's role in the balancing of interests between society and the individual involves the balancing of rights in ever changing circumstances in accord with the unchanging balance established by the principles embodied in the Constitution.

The Interests Of Corporate Society

The fundamental interest of corporate society is for prompt and efficient law enforcement. *Spano, supra.* The result of prompt and efficient law enforcement is conviction of the guilty. To accomplish conviction of the guilty, law enforcement officials must have available all means which produce reliable evidence without impingement of the criminal defendant's constitutional rights.

One of the most important sources of evidence is the defendant himself. The court has recognized the value of confessions on several occasions:

> Indeed, far from being prohibited by the Constitution, admissions of guilt by wrong-doers, if not coerced, are inherently desireable. *United States v Washington,* 431 US 181, 185 (1977).

In *Massiah v United States,* 377 US 201, 207 (1964), this court recognized that it was appropriate for government agents to continue investigation of a defendant's activities even after the defendant had been indicted. Since statements from defendant's are an appropriate object of governmental investigation, the fundamental interests of society are furthered, at no cost to the rights of the defendant, when, as in the instant case, government officials obtain a voluntary confession from the defendant

whether before arrest or after indictment. The inconsistent holding of the Michigan Supreme Court should be reversed.

As the focus turns towards the rights of the individual defendant, the words interrogation and counsel contained in the facts of this case draw attention immediately to the Fifth Amendment guarantee against compelled self-incrimination and the Sixth Amendment guarantee to the assistance of counsel as both of these protections have been applied to the States through the due process clause of the Fourteenth Amendment.

The Fifth Amendment

The core protection afforded by the Fifth Amendment, clear from the language of the Amendment itself, is that a criminal defendant cannot be "compelled in any criminal case to be a witness against himself . . .". This portion of the Fifth Amendment has two key aspects: it applies to testimonial evidence, obtained by compulsion. *South Dakota v Neville,* 459 US 553, 562 (1983). *Fisher v United States,* 425 US 391, 397 (1976). At its root, the Fifth Amendment privilege was designed to protect against both unreliable evidence which can result from compelled statements and to avoid the indecency of such proceedings as the inquisitorial court of Star Chamber, where failure to give self-incriminating testimony resulted in a breach of the Star Chamber oath and consequent punishment. *Miranda v Arizona,* 384 US 436, 458-460 (1966).

The consistent liberal construction of the Fifth Amendment applied by this court has resulted in the expansion of the protection of the Fifth Amendment beyond the

courtroom to custodial interrogation such as that at issue in the instant case. *Miranda,* 384 US 436, 360-361.

At least in the view of its author, *Miranda* did not create new substantive rights but merely developed the procedural requirements designed to provide "practical reinforcement" for the Fifth Amendment rights. *New York v Quarels,* 467 US —, —; 104 SCt 2626 (1984). The reinforcement was designed to off-set the presumed inherent, psychological compulsion present in custodial interrogation. *Oregon v Elstad,* 470 US —, 84 LE2d 222, 229 (1985). The aim of the *Miranda* warnings was to give an objective basis for the determination of whether the Fifth Amendment right, as articulated in *Miranda,* had been waived under the standard articulated by this court in *Johnson v Zerbst,* 303 US 458 (1937).

The procedural right articulated in Miranda of particular relevance to the instant case is the right to the presence of counsel during custodial interrogation. The Fifth Amendment right to counsel is a narrow one. It is the right to "confer with or have counsel present before answering any questions" during custodial interrogation. *Blasingame v Estelle,* 604 F2d 893, 896 (Fifth Circuit, 1979). The Fifth Amendment right to counsel is designed to protect a defendant in the exercise of his right to remain silent assuring that any statements are not obtained through coercion or trickery. *Berkemer v McCarty,* — US —; 104 SCt 3138, 3150, Note 27; 82 LE2d 317 (1984).

The *Miranda* warnings were not designed to prohibit confessions, rather they were designed to insure that any confession made is uncoerced. As this court said in *Wan*

v United States, 266 US 1, 14-15(1929) and reaffirmed in *Miranda,* 384 US 436, 462, "a confession may be given voluntarily, although it was made to police officers while in custody and in answer to an examination by them." Thus, the question to be resolved in the Fifth Amendment aspect of the analysis of this case is whether the confession given by Respondent was voluntary under the standards articulated in *Miranda.*

There is no record evidence of any physical punishment or deprivation used to manipulate the defendant into confessing, thus, there was no physical coercion which would vitiate the voluntariness of defendant's confession. Secondly, as testified to during the *Walker* hearing, Respondent was carefully advised of his Fifth Amendment rights in accordance with this court's opinion in *Miranda.* With each portion of the advice of rights, defendant was asked if he understood the right explained and if he was willing to waive those rights. Respondent indicated that he understood his rights and wished to waive them. Ultimately, defendant signed a written waiver of his constitutional rights which is indicative of a voluntary waiver. *North Carolina v Butler,* 441 US 369, 373 (1979).

Respondent was specifically advised of his right to have counsel present during interrogation and when asked if he desired to have an attorney present, he stated "I don't need him present. I am going to plead guilty anyway." (JA 62a). The facts of this case demonstrate that Respondent was fully advised of his rights such that any waiver was knowingly and intelligently made. As well, since any psychological conclusion was overcome by the advice of rights and since there was no physical compulsion involved, defendant's waiver of his constitutional

rights and subsequent confession were voluntary and the trial court properly admitted the evidence. On this point, all agree.

Edwards v Arizona Was Not Violated

The real controversy in this case arises over the implications of the fact that the confession was obtained after defendant had requested appointment of counsel at his initial arraignment. The Michigan Supreme Court held that the request for appointment of counsel at arraignment precluded further police-initiated interrogation through analogous application of this court's decision in *Edwards v Arizona,* 451 US 477 (1981). Though the Michigan Supreme Court rightly held that there was no Fifth Amendment violation and thus no direct violation of *Edwards v Arizona,* which was limited by this court to Fifth Amendment analysis, it is appropriate to briefly address the question of the Fifth Amendment implications of the arraignment request for counsel.

This court's decision in *Edwards v Arizona,* was a clarification of the statement in *Miranda* that upon an accused's request for the presence of counsel, "the interrogation must cease until an attorney is present." *Miranda, supra,* 384 US at 474. In *Edwards,* during custodial interrogation conducted by police, defendant requested the presence of his counsel. *Edwards, supra,* 458 US at 479. At that point, interrogation was terminated but the next morning, a guard came to Edwards' cell to inform him of the detectives' desire to talk to him. Edwards replied that he did not want to talk, but the guard told him that he had to. *Edwards, id.* The guard took Edwards to meet with the detective. Edwards was advised of his

"Miranda rights" which he waived. Edwards then confessed. *Edwards, id.*

Mr. Justice White's opinion in *Edwards* focused on what constitutes a knowing and intelligent relinquishment or abandonment of a known right or privilege. *Edwards, supra,* 451 US at 482; 101 SCt at 1884. A defendant cannot, in the legal sense of voluntariness, waive his right to counsel unless he knows and fully understands that right. Police conduct in the *Edwards* case brought into question whether the relinquishment of the right to counsel was knowing and intelligent. The effect of the Miranda Rule is to make the police the legal advisor of a defendant in the initial phase of custodial interrogation. Thus, Edwards was depending on the police as the source of his knowledge of his legal rights. Edwards certainly could have been confused as to what his rights were because of inconsistent police conduct.

The initial cessation of interrogation upon Edwards' request for counsel would indicate tc Edwards that the right to the presence of counsel truly did exist and that the police would honor that right. However, the later reinterrogation (especially in light of the comment of the jailer that Edwards must talk) was at least an implicit statement by the police that defendant did not have the right to the presence of counsel at interrogation or at the very least that they would not honor that right if it existed. This inconsistent police conduct could bring confusion into the defendant's mind precluding a knowing and intelligent waiver.

Additionally, the waiver in Edwards is drawn into question because police-initiated reinterrogation is a re-

quest by police that the defendant abandon in its totality the very specific and narrow right to the presence of counsel that the defendant had previously invoked. Inconsistent behavior is asked of the defendant. Thus, the voluntariness of this confession is called into question because any change of mind by defendant has come at the behest of the police. Reinterrogation in the circumstances of *Edwards* directly impinged upon the defendant's Fifth Amendment right to the presence of counsel as established in Miranda.

As recognized by this court in *Edwards,* the request made by Edwards "expressed his desire to deal with the police only through counsel . . ." *Edwards, supra,* 451 US at 486. The reappearance of police without the presence of counsel impinged on that right. The *Edwards* rule is a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers" who repeatedly attempt to persuade the defendant to relinquish his rights. *Oregon v Bradshaw,* — US —; 103 SCt 2830, 2834 (1983). Thus under *Edwards* a confession obtained after a defendant had requested to deal with police only through counsel can only be voluntary if the reinterrogation is initiated by the defendant and is followed by voluntary waiver of his Fifth Amendment rights.

The question to be resolved in the instant case is whether Respondent's request at arraignment for appointment of counsel is the type of invocation of the right to counsel which indicates a desire to deal with police only through counsel and which requires the prophylactic rule of *Edwards* to protect the defendant's constitutional rights.

Both *Miranda* and *Edwards* dealt exclusively with the setting of police-initiated interrogation. In each of those cases, the only right to counsel which the defendant enjoyed at the relevant time was the Fifth Amendment right to have counsel present during custodial interrogation. In *Edwards,* the defendant invoked this right, but after a delay the police reinitiated interrogation. Thus, there was a narrow right invoked in its fullest extent, which the defendant was later asked to waive. In the instant case, defendant never invoked his right to have counsel present during interrogation. As noted in the Statement Of The Case, defendant was interrogated numerous times before his arrest and on a couple of occasions after his arrest. At each time, defendant was advised of his *Miranda* rights which he waived. The only time that defendant requested counsel was during his arraignment. In order to understand the nature of the right invoked by defendant at the arraignment, the arraignment transscript must be reviewed. The following occurred at Respondent's arraignment:

> THE COURT: Now, because these are very serious charges which are brought against you, you have a right to be represented by an attorney, at all stages of the proceedings, including the preliminary examination I just mentioned. If you want one. If you cannot afford an attorney, then you may petition the Circuit Judge of this County for the appointment of an attorney to represent you at public expense. Now my first question to you is this. Do you intend to retain your your own attorney?

THE DEFENDANT: I don't have the money.

THE COURT: Do you wish to have one appointed for you?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. I'll place an affidavit in the file for you to make out for that purpose. Until you have a chance to talk with an attorney, the Court would strongly recommend that you stand mute, that means say nothing. If you do this, the Court will enter a plea of not guilty for you and set the matter for preliminary examination. Is that what you wish to do?

THE DEFENDANT: Right sir.

(JA 3a-4a).

The right which Respondent invoked at arraignment was only that right which was explained to him by the arraigning Magistrate. The right explained by the arraigning Magistrate was only the right to have counsel represent Respondent at the preliminary examination and thereafter in the judicial proceedings. The arraigning Magistrate in no way expressly or impliedly indicated that the scope of the right to counsel which would be invoked by a request for the appointment of counsel related to police interrogation. There is nothing in this record to indicate the defendant desired to deal with police only through counsel.

Since defendant had at no time indicated a desire to deal with police only through counsel, there could be no badgering by police as was the case in *Edwards,* and thus no need for a prophylactic rule to assure preservation

of the defendant's rights. As the Michigan Supreme Court properly held, there was no invocation of defendant's Fifth Amendment rights at the arraignment and therefore there could be no violation of defendant's Fifth Amendment rights by the further police-initiated interrogation. Petitioner contends that that conclusion is accurate.

Despite the Michigan Supreme Court's sound reasoning on the Fifth Amendment question, it nonetheless boldly stepped out into new ground and reversed defendant's conviction claiming that admission of the confession obtained after request for counsel at arraignment was a violation of defendant's Sixth Amendment rights. Again, the proper analysis of the Sixth Amendment interests involved in this case requires a brief historical development of the Sixth Amendment right to counsel and then the application to the instant case.

The Sixth Amendment

The Sixth Amendment cases dealing with the scope of the right to counsel during interrogation have not been so clearly synthesized into comprehensive rules like has been done for the Fifth Amendment right to remain silent. Since this is primarily virgin territory, careful analysis of the Sixth Amendment right to counsel and its implications in the instant case is necessary.

This court in *United States v Ash,* 413 US 302 (1973), cast the mold for the appropriate analysis of Sixth Amendment questions. The history of the Sixth Amendment must be examined so that the immutable protections which carry the lasting importance of the Sixth

Amendment right to counsel can be properly applied to the ever changing criminal justice system. The accepted history of the Sixth Amendment as recorded in this court's cases begins most notably in *Powell v Alabama,* 287 US 45 (1932).

The most significant aspect of Sixth Amendment history developed in *Powell* was that the simple words "to have the assistance of counsel for his defense" in the Sixth Amendment was a repudiation of the common law rule that denied criminal defendants the right to the assistance of counsel in felony cases. *Powell, supra,* 287 US at 60. In *United States v Ash,* 413 US 305 (1973), this court reexamined the historical foundations of the Sixth Amendment. In *Ash,* this court concluded that the right to counsel was designed to "minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *Ash, supra,* 413 US at 309. Simply put, the Sixth Amendment recognizes that the average defendant does not have the experience and education which would put him on an equal footing with a skilled prosecutor.

The historical analysis engaged in in *Ash* led this court to conclude that the "core purpose" of the right to the assistance of counsel is to "assure 'Assistance' at trial when the accused is confronted with both the intricacies of the law and advocacy of the public prosecutor." *Ash,* 413 US at 309.

While the right to counsel under the Sixth Amendment, as the right to be free from compelled self-incrimination under the Fifth Amendment, is rooted in the courtroom setting, the protections afforded by the Sixth Amend-

ment have not been limited to the narrow scope of representation during the formal trial. As criminal procedure has changed, the breadth of the right to the assistance of counsel has also changed so that the immutable interests protected by that right are not diluted. See example *United States v Wade,* 388 US 218 (1967). Expansion of the application of the protections embodied within the Sixth Amendment is not controlled merely by the predilections of the court but rather the right to counsel has only been expanded "when new contexts appear presenting the same dangers that gave birth initially to the right itself." *United States v Ash,* 413 US at 311. Thus, the initial question to be addressed is whether the event, police interrogation, and the procedural timing of that event, between initial arraignment request for counsel and first contact with appointed counsel, present the same dangers that led to the adoption of the Sixth Amendment.

The first question is whether the right to counsel under the Sixth Amendment had attached at the time Respondent was interrogated. This court has expanded the Sixth Amendment right beyond the courtroom to certain "critical" pretrial stages of the proceedings. *United States v Gouveia,* — US —; 104 SCt 2292, 2298 (1984). The question then is whether the instant case had reached a critical stage at the time Respondent was interrogated.

This court has established by a plurality in *Kirby v Illinois,* 406 US 682 (1972) and by a majority in *United States v Gouveia,* — US —; 104 SCt 2292, 2296 (1984):

> That the Sixth Amendment right to counsel attaches *only* when formal judicial proceedings are initiated against an individual by way of indictment, informa-

tion, arraignment, or preliminary hearing. (Emphasis added).[4]

Petitioner is aware that in *Brewer v Williams,* 430 US 387 (1977), this court found a violation of defendant's Sixth Amendment right to counsel where the proceedings has only advanced to the stage of arraignment on the original arrest warrant. Nonetheless, Petitioner submits to this court that the Sixth Amendment right to counsel had not yet attached in the instant case even though defendant had been arraigned on the original arrest warrant. Apparently it was assumed that the Sixth Amendment applied to the circumstances of *Brewer v Williams* and perhaps this question was not there litigated. Further, since the question is one of procedure, it must be analyzed under the peculiarities of the procedure of each state. See *Anonymous v Baker,* 360 US 287, 290-291 (1959).

The Sixth Amendment Had Not Attached

In Michigan, any person charged with a felony, after arrest, must be brought before a Magistrate or District Court Judge without unnecessary delay for his initial arraignment. MCL § 764.26; MSA § 28.85. When unreasonable delay has been employed as a tool to extract a statement from the defendant, Michigan law precludes admission of that statement. *People v Bladel & Jackson,* 421

[4]It is true that this court in *Escobedo v Illinois,* 378 US 478 (1964) applied Sixth Amendment analysis to custodial interrogation which occurred prior to any formal charges being brought. Petitioner submits, however, that the *Escobedo* case and its protections have been fully subsumed by *Miranda* and that, in fact, *Escobedo's* extension of the Sixth Amendment right to instances occurring prior to the filing of formal charges has been overruled by *Kirby* and *Gouveia.*

Mich 79; 365 NW2d 56 (1985). The speedy arraignment required by statute is administered by a District Judge who has no jurisdiction to accept a plea of guilty to a felony charge, but who must read the contents of the charges against the defendant, inform him of his right to preliminary examination, his right to an attorney either retained or appointed and his right to bond. If a defendant so desires, he may have a preliminary examination. The preliminary examination must be held within 12 days after arraignment. MCLA § 766.4; MSA 28.922. The 12 day requirement is jurisdictional. MCLA § 766.7; MSA 28.925. *People v Weston,* 413 Mich 372, 319 NW2d 537 (1982).

The District Judge who arraigned Respondent was without jurisdiction to enter a conviction against defendant by plea or otherwise. Under this particular state procedure, Petitioner submits that no critical stage of the proceedings had been reached until the preliminary examination. The use of the terminology "indictment, information, arraignment or preliminary hearing" in *Gouveia* is somewhat difficult to apply without knowing how this court was using those terms. Petitioner submits that the preliminary hearing terminology used by the court denotes the earliest point at which the Sixth Amendment right attaches under procedures like those employed in Michigan. While the defendant had been arraigned in the instant case, there is also a second arraignment in Michigan procedure which occurs in the Circuit Court following bindover after preliminary examination, at which time defendant has his first opportunity to enter a plea in a court with jurisdiction to render a final decision in a felony case. Thus, Petitioner submits that under the Sixth Amendment precedent of this court, the Sixth Amendment right to

counsel had not yet attached at the time defendant was interrogated and therefore it could not have been violated and the Michigan Supreme Court must be reversed.

There is no reason why this court should extend the protection of the Sixth Amendment any farther than Petitioner believes it already has. The defendant's rights are fully protected in the context of custodial interrogation between initial arraignment and preliminary examination by the Fifth Amendment right to counsel established in *Miranda.* Further, the Sixth Amendment concern dealt with in *Powell v Alabama, supra,* that of adequate time for trial preparation, is fully protected by the presence of counsel at the preliminary examination, the greatest discovery tool for the defense, and the provision of counsel from the time of the preliminary examination until trial which is more than adequate time for preparation. Simply put, there is no significant interest of the defendant that needs the additional protection of the Sixth Amendment with its consequent burden on the State.

Any Sixth Amendment Right To Counsel Was Waived

While it is clear that Petitioner would be successful if this court finds that the Sixth Amendment had not attached at the time Respondent gave the challenged confession, prudence compels Petitioner to continue the analysis of this case assuming arguendo that the Sixth Amendment right to counsel had attached.

If the Sixth Amendment right to counsel had attached at the time Respondent was interrogated, *Massiah v United States,* 377 US 201 (1964) makes it certain that the Sixth Amendment applies to the event. *Massiah* stands for

the proposition that once a critical stage of the proceedings has been reached, elicitation of incriminating statements from a defendant by police in the absence of counsel or waiver of the presence of counsel is a violation of the Sixth Amendment. Other of this court's cases which have dealt with Sixth Amendment analysis of the propriety of police-elicitation of incriminating statements from a criminal defendant are *Brewer v Williams,* 430 US 387 (1979), *United States v Henry,* 447 US 268 (1980) and *Escobedo v Illinois,* 378 US 478 (1964). Comparison of the facts in the instant case with the four major Sixth Amendment-incriminating statement cases of this court shows that none of the problems that arose in those four cases were present in the instant case and thus there was no violation of defendant's Sixth Amendment rights.

In *Massiah, supra,* defendant had retained a lawyer, entered a plea of not guilty and been released on bail. While on bail, government agents were able to convince Massiah's co-defendant to put a radio transmitter in his automobile so that when the co-defendant and Massiah rode together the government agents could intercept the conversations between Massiah and his co-defendant. While acting much as an agent for the government, Massiah's co-defendant engaged in lengthy conversations with Massiah within the co-defendant's automobile. The conversations included several incriminating statements which were used against Massiah at trial. This court found a Sixth Amendment violation. In *Massiah,* there was clearly an interference with a then existing attorney-client relationship without any waiver of the defendant's Sixth Amendment rights due to the surreptitious means by which the incriminating statements were obtained.

In *Escobedo, supra,* the defendant had retained counsel to represent him in connection with charges arising out of the murder of Escobedo's brother-in-law. The incriminating statements admitted into evidence against Escobedo were obtained only after hours of repeated questioning which continued despite defendant's insistence that he would like to have the advice of his counsel before making any statement. *Escobedo, supra,* 378 US at 479. Additionally, Escobedo's attorney attempted to make contact with Escobedo but was denied the opportunity to do so. *Escobedo, supra,* 378 US at 480-481. Finally, when Escobedo asked to talk with his attorney after having seen him at the police station, Escobedo was told that his attorney did not want to speak with him even though the police knew well that Escobedo's attorney did want to speak with him. Ecobedo was neither advised of his right to remain silent nor any right to the presence of counsel nor did he waive those rights. Again, in *Escobedo,* a Sixth Amendment violation was found where there was interference with a then existing attorney-client relationship and there was no advice or waiver of any right to have contact with counsel.

In *Brewer v Williams, supra,* defendant Williams contacted his attorney apparently with the message that Williams decided to turn himself in on an outstanding warrant for murder. The attorney contacted the police to arrange for the surrender of Williams to police in Davenport, Iowa and his transportation to Des Moines where he would stand trial. *Williams, supra,* 430 US at 390. Contact was made with an attorney in Davenport who was apparently present during the arraignment of Williams which occurred in Davenport. Both the attorney at Davenport and

the one at Des Moines advised defendant not to speak with police. Further, both attorneys reached agreement with the transporting officers that they would not interrogate Williams during the ride from Davenport to Des Moines. *Brewer v Williams, supra,* 430 US at 391-392. Before getting into the car to be transported to Des Moines, defendant was advised of his Miranda rights by Detective Leaming. Rather than waiving those rights, defendant reaffirmed his position through counsel that there was to be no questioning of the defendant during the ride to Des Moines. *Brewer v Williams, id.* At the completion of the infamous "Christian burial speech", Defendant Williams made incriminating statements. While this court found that Williams appeared to understand his right to counsel, there was no evidence that Williams desired to relinquish that right. In fact, this court found that "Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right." *Williams, supra,* 430 US at 404. Again, the Sixth Amendment violation was found where there was an interference by police with a then existing attorney-client relationship where the right to the presence of counsel had not been waived.

The final note of the quartet of Sixth Amendment cases was sounded in *United States v Henry,* 447 US 264 (1980). In *Henry,* the defendant was incarcerated awaiting trial on a bank robbery charge. Before counsel was appointed for Henry, see 447 US at 226, government agents made contact with a cell-mate of Henry who had been a confidential informant for the FBI in the past. While the agents only asked the cell-mate to listen for incriminating statements made by Henry, the testimony of the cell-mate in-

dicated that he elicited much of the information which was incriminating against Henry during conversations within the jail, even after appointment of counsel. The use of an undisclosed undercover informant to elicit incriminating statements from Henry was found to have violated Henry's Sixth Amendment rights since there could not have been a knowing and voluntary waiver of those rights where Henry was not even aware of his cell-mate's connection to the government. In *Henry* as in the previous cases, there was an interference with an existing attorney-client relationship where the right to the assistance of counsel was not waived.

The first distinguishing aspect between the case at bar and the four cases noted above is that there was no established attorney-client relationship which was interfered with by the challenged interrogation. While a notice of appointment had been sent out by the Court Administrator's Office, there is no indication that defense counsel had received that notice and the record reflects that defense counsel and defendant had never met. While it is true that, if the existence of an on-going attorney-client relationship is a prerequisite for a Sixth Amendment violation in the circumstances of the instant case, those with the financial ability to retain counsel may be in a better position than those who are indigent and have to depend on court appointed counsel, there is nonetheless adequate justification for such a rule.

The penalty exacted by the Michigan Supreme Court for the alleged violation of Respondent's Sixth Amendment rights was suppression of his confession. Suppression is a remedial device the use of which is controlled by careful cost-benefit analysis. *United States v Leon*, — US

—; 104 SCt 3405, 3412-3413 (1984). Under such analysis the relative evil of the police conduct is extremely relevant, if not controlling. The evil present in the knowing interference with an existing attorney-client relationship such as occurred in the four cases above, when compared to the innocent request for the opportunity to interrogate in the instant case, point toward the conclusion that the scales only tip in favor of the exclusion where the greater evil occurs. This issue will be dealt with more fully below when the practicalities of the Michigan Court's rule are discussed. (Note also the concerns articulated in the Michigan Code of Professional Responsibility DR 7-104, Communications with adverse party.)

None of this court's cases discussed above create a bar to governmental elicitation of incriminating statements from a defendant once his Sixth Amendment right to counsel has attached. The second problem in each of the four cases is that there was no waiver of that Sixth Amendment right before the incriminating statements were obtained. Petitioner submits that this is the most import distinguishing factor between the case at bar and the previous Sixth Amendment cases addressed by this Court. Petitioner submits that the Sixth Amendment right to counsel is waivable and that in the instant case, Respondent knowingly and intelligently relinquished his right to have counsel present during interrogation as that right is secured by the Sixth Amendment. (See e.g. *Faretta v California*, 422 US 806 (1975)).

While the Sixth Amendment right to the assistance of counsel is an extremely broad right in that it has application to many different circumstances, a proper analysis of the waiver question must focus only on that portion of

the Sixth Amendment right which must be waived in order to render the government elicited incriminating statement admissible. The narrow portion of the Sixth Amendment right to counsel involved in the instant case is the right to the presence of counsel during "post-indictment communications between the accused and agents of the government" whether or not the defendant is in custody at the time of the interrogation. *United States v Henry,* 447 US 264, 270 (1980). Thus, if defendant was adequately advised, understood and waived the right to the presence of counsel, the deficiency in the four previous cases has been overcome and the confession at bar should be admissible.

Miranda Warnings Lay A Proper Foundation For Sixth Amendment Waiver

The confession challenged at bar was made during what might be termed (if we accept that the Sixth Amendment had attached) critical-stage/custodial interrogation. Because of the coexistence of custody and a critical stage, the rights to the presence of counsel afforded by both the Fifth Amendment and Sixth Amendment overlapped. To avoid Fifth Amendment problems, the police properly advised Respondent of his Miranda rights. Petitioner submits that since the Fifth and Sixth Amendment rights to counsel, as they apply to the narrow circumstance of critical-stage/custodial interrogation, are identical in scope and purpose, a knowing, intelligent, and voluntary waiver of the right to the presence of counsel pursuant to Miranda warnings constitutes a waiver of those rights contained in both the Fifth and Sixth Amendments. This does not deny the analytical distinctions between the Fifth and Sixth Amendment rights to counsel, see *Rhode Island v*

Innis, 446 US 291, 300, Note 4, (1980), but it is to say that in the peculiar circumstances of this case, the overlap of the protections under the two amendments creates an identity between the cognitive content necessary for a knowing, intelligent and voluntary waiver of either the Fifth or Sixth Amendment right to counsel. (This analysis has been accepted in *United States v Karr,* 742 F2d 493 (9th Circuit, 1984)).

It has been suggested by some that there ought to be a higher standard of waiver for the Sixth Amendment right to counsel than the Fifth Amendment right to counsel. See *People v Bladel,* 421 Mich 79, Note 15 (1985). This Court, however, has stated that the standard to be met is that embodied in *Johnson v Zerbst,* 304 US at 464, the same standard that must be met for waiver of Fifth Amendment rights. *Brewer v Williams, supra,* 430 US at 404. Petitioner submits that that is the appropriate standard for it is difficult to comprehend how there can be a higher standard. Either a waiver is knowingly and intelligently made or is not. The only greater requirement that could be made is not one of a higher standard of waiver but of more evidence to support the fact of waiver. At least in the instant case, there is no reason at all to doubt the word of the detectives who testified, especially in light of the written waiver of defendant. *North Carolina v Butler, supra.* There is no higher ground on which to stand than that on which the waiver in the instant case is firmly planted.

The Sixth Amendment Requires No Edwards Protection

Even assuming that there was a valid waiver of defendant's Sixth Amendment right to counsel, the Michi-

gan Supreme Court was not satisfied with the constitutional protections afforded the defendant and instead decided that it was appropriate to suppress the reliable and valuable confession because, in the mind of the majority of the Michigan Supreme Court, the Sixth Amendment precludes police-initiated interrogation after defendant has invoked his Sixth Amendment right to counsel. The Michigan Supreme Court based its conclusion on an analogy to *Edwards v Arizona*. Petitioner submits that the circumstances of the instant case and *Edwards* are so disparate that analogous application of the *Edwards* rule to the instant case is most inappropriate.

The concerns involved in *Edwards v Arizona* have been discussed above. Essentially, *Edwards* is a prophylactic rule designed to prevent police from repeatedly requesting a defendant to relinquish his constitutional rights when the defendant has previously indicated his desire not to do so. In other words, the defendant should neither be beaten into submission or questioned into submission.

Edwards can only be properly applied by analogy if a police request that defendant submit to interrogation after defendant has invoked that portion of his Sixth Amendment right of which he was advised at arraignment would present the same danger of police badgering of the defendant into unwilling relinquishment of his constitutional rights. Petitioner submits that such a danger does not exist.

As more fully stated above, at his District Court arraignment, Respondent was advised of his right to have an attorney represent him at the preliminary examination and all subsequent proceedings. It was that narrow right which was clearly invoked by Respondent at his arraignment. There was nothing either in the content of the advice given by the District Court judge or in defendant's request for appointed counsel which in any way indicated that defendant did not wish to engage in further interrogation. There was nothing that indicated that defendant wished to deal with police only through counsel. Moreover, it would be serious error to conclude that every defendant who desires to have counsel represent him during judicial proceedings also wishes to speak with police only through counsel.

The facts of the Fifth Circuit case of *Nash v Estelle*, 597 F2d 513 (5th Circuit, 1979) are very helpful in seeing a circumstance in which a defendant clearly articulates both a desire to have counsel represent him during the judicial process and a desire to speak with the authorities without the presence of counsel. The following is an excerpt from an interview by an Assistant Prosecutor six days after Nash was arrested on a murder charge:

(Prosecutor Files)

Files: You want one to be appointed for you?

Nash: Yes, sir.

Files: OK. I had hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now.

Nash: But, uh I kinda, you know, wanted, you know to talk about it, you know, to kinda you know, try to get it straightened out.

Files: Well, I can talk about it with you and I would like to, but if you want a lawyer, well, I am going to have to hold off, I can't talk to you. It's your life.

Nash: I would like to have a lawyer, but I'd rather talk to you.

Files: Well, what that says there is, it doesn't say that you don't ever want to have a lawyer, it says that you don't want to have a lawyer here, now. You got the right now, and I want you to know that. But if you want to have a lawyer here, well, I am not going to talk to you about it.

Nash: No, I would rather talk to you.

Wiles: You would rather talk to me? You do not want to have a lawyer here right now?

Nash: No, sir.

Files: You are absolutely certain of that?

Nash: Yes, sir. (*Nash, supra,* at 516-517).

The subsequent taped confession was found to be admissible on the basis that it was permissible for defendant to unburden himself by confessing to his custodians, *Nash,* at 517, while still maintaining his right to be represented during judicial proceedings. This court's decision in *Smith v Illinois,* 469 US —, 105 SCt 490; 83 LEd2d 488 (1984) calls into question the admissibility of this statement because of the rather clear request for counsel initially made. Nonetheless, this case remains illustrative of an individual's desire to speak directly with police while maintaining the remainder of the incidents of the right to counsel.

The Fifth Circuit applied the *Nash* reasoning in a case with facts strikingly similar to those in the instant case. In *Blasingame v Estelle,* 604 F2d 893 (CA 5) (1979), defendant Blasingame was arrested late at night and arraigned the following morning. At that arraignment, he

was advised of his right to counsel and filled out a form requesting a court appointed attorney. That night, a Dallas police officer interviewed Blasingame after having advised Blasingame of his Miranda rights which Blasingame knowingly, intelligently and voluntarily waived. On appeal, Blasingame asserted that a Fifth Circuit predecessor of *Edwards v Arizona* precluded questioning after his unequivocal request for counsel at arraignment. The *Blasingame* court saw the issue this way:

> In evaluating this argument, the crucial inquiry is whether defendant asserted his right to counsel in such a manner that later police inquiry 'has impinged on the exercise of the suspect's continuing option to cut off the interview.'
>
> *Nash v Estelle,* 597 F2d 513, 518 (CA 5) (1979). (*Blasingame* at 895).

The *Blasingame* court found that the right to counsel asserted by the defendant was not such that precluded later police-initiated interrogation and thus the rights asserted at arraignment were not impinged by the later inquiry. The *Blasingame* court said "Nash recognizes that some defendants may well wish to have an attorney to represent them in legal proceedings, yet wish to assist the investigation by talking to an investigating officer without an attorney present." (*Blasingame,* supra, at 895-896). After noting that the assertion of the right to counsel at arraignment was unrelated to his Fifth Amendment right to confer or have counsel present during custodial interrogation, the *Blasingame* court held that:

> Therefore, we hold that the request for an attorney at arraignment does not prevent subsequent station-house interrogation where the request at arraignment

> is not made in such a way as to effectively exercise the right to preclude any subsequent interrogation.
>
> (*Blasingame, supra,* at 896).

In *Nash* and *Blasingame,* like *Jordan v Watkins,* 681 F2d 1067 (CA 5, 1982) and *Johnson v Commonwealth,* 55 SE2d 525 (VA 1979), the courts found that there was so little connection between the request for counsel at arraignment in exercise of the defendant's Sixth Amendment right to counsel and the subsequent interrogation, that the subsequent interrogation did not impinge on the right previously exercised.[5] The simple fact is that where a defendant has previously given notice of his intent to exercise one constitutional right a later police request to waive a different constitutional right can in no way impinge upon the original intent to exercise the first constitutional right. Under these circumstances, there is no danger that the defendant would be badgered to the point where he would unwillingly relinquish a right he sought to preserve.

The Virginia Supreme Court in *Johnson v Commonwealth, supra,* found guidance for dealing with the question in the instant case in this court's case of *Michigan v Mosley,* 423 US 96 (1975). *Mosley* provides much more guidance in resolving the issue in the instant case than does *Edwards v Arizona.* The added guidance arises out of the fact that while in *Edwards* the defendant was asked to relinquish the very right he had previously asserted, the defendant in *Mosley* was asked to relinquish his right to remain silent in a separate prosecution after previously invoking that right in regard to a different prosecution.

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[5]There are a number of cases which, though not without their problems in regard to the clarity of the rule therein ap-

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In *Michigan v Mosley, supra,* the defendant was arrested on a number of robbery charges. Detective Cowie interviewed the defendant about the robberies. During the interrogation, defendant Mosley exercised his right to remain silent, rather than his right to the presence of counsel. Two hours later, Detective Hill initiated interrogation of Mosley in reference to an unrelated homicide. The second interrogation began with advice and waiver of Miranda rights. On appeal, Mosley claimed that his assertion of the right to remain silent, made to Detective Cowie, precluded further police-initiated interrogation. This court found that Mosley's rights had not been violated.

The focus of this court's decision in *Mosley* was whether the defendant's " 'right to cut off questioning' was fully respected in this case." *Michigan v Mosley,* 423 US 103; 96 SCt 327. The court found that the defendant's rights were fully respected. *Miranda* did not state when interrogation could be resumed after an exercise of the right to remain silent. This court refused to hold that an exercise of the right to remain silent precludes all further interrogation. Neither would this court allow reinterrogation after a momentary pause. *Mosley, supra,* 423 US 107; 96 SCt 328. Thus, *Mosley* added to *Miranda* the rule that the right to remain silent prevents further police initiated interrogation until there has been a significant period during which the questioning has been suspended.

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plied, arguably involve circumstances where the request at arraignment has a close nexus to an invocation of right to where the request for counsel follows the arraigning Magistrate's recitation of Miranda warnings. (e.g. *Silva v Estelle,* 672 F2d 457 (CA 5, 1982)).

Another aspect of the reasoning in *Mosley* is that the defendant's exercise of his right to remain silent made during questioning by Detective Cowie was, at the most, ambiguous as to whether Mosley was desirous of talking about any other crimes. The court noted that in these circumstances, questioning on an unrelated crime was "quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions about the robberies" *Mosley,* 423 US at 105; 96 SCt at 327. The advice of Miranda rights before the second interrogation gave the defendant a full and fair opportunity to once again invoke his right to remain silent. The subsequent advice of rights, though placing a minor burden on the defendant of having to once again assert his right to remain silent, if that was his desire, was heavily outweighted by the beneficial value of resolving any ambiguity in the defendant's previous invocation of his right to remain silent. The facts and reasoning of *Mosley* are far more in accord with the instant case than is *Edwards v Arizona.*

In the instant case, Respondent's request for counsel at arraignment does not necessarily indicate that defendant desires to only deal with police through counsel, the clear indication by the defendant in *Edwards.* Thus, subsequent questioning by the police was "quite consistent" with Respondent's previous request for counsel. Since the individuals who interrogated Respondent did not have previous contact with Respondent, their actions of reinitiating interrogation were not inconsistent with any previous statements that they had made; thus, defendant could not reasonably believe that his rights would not be honored.

As Petitioner stated at the beginning of this brief, the question presented in this case involves the balanc-

ing and intersection of the rights possessed by corporate society over against those of the individual defendant. It would be wrong to fall into the trap of the fallacy of exclusion of the middle. Petitioner does not argue in this brief that failure of the defendant at arraignment to state that he does not want to speak with the police constitutes a waiver of whatever Sixth Amendment right the defendant may have to the presence of counsel during interrogation. Petitioner's argument is not one that argues for displacement of the individual's interests by the interests of corporate society. Rather, Petitioner argues for a both/and rule. Petitioner argues that both society and the individual can be best protected by a rule which allows police-initiated interrogation prior to any indication by the defendant of a desire to deal with police only through counsel but that that interrogation can only take place once the defendant relinquishes his rights under the *Johnson v Zerbst* test.

The rule argued for by Petitioner places very little burden on Respondent. All Respondent needed to do to protect himself fully was to say "yes" when the detectives asked him if he wanted to have counsel present before any further interrogation occurred. This is no greater than the burden placed on the defendant in *Michigan v Mosley* to assert his desire to remain silent during the subsequent interrogation. There is no question but that Respondent's Sixth Amendment rights were scrupulously honored. Respondent's waiver of his right to the presence of counsel during interrogation was knowingly, intelligently and voluntarily made. There is absolutely no rational reason to suppress the challenged confession in the instant case.

Since none of the dangers presented by *Miranda, Edwards* or the quartet of Sixth Amendment cases are present in the instant case, Respondent's confession was obtained under circumstances where there is no risk of unreliability and no offense against Respondent's constitutional rights. Our adversary system of justice depends on the parties to develop the evidence diligently and for the courts to impose proper rules guaranteeing the reliability of that evidence so that the citizens whose daily lives are interrupted for jury service and who are charged with finding the truth can have available to them all possible means by which they can fulfill their duty of finding truth. A trial deprived of evidence as significant and reliable as the confession in the instant case would be a mockery and the jury would be defrauded. Admission of this confession would not create a risk that an innocent man would be convicted, see *Brewer v Williams,* 430 US at 437, but suppression of this evidence may well let a guilty murderer go free.

The Michigan Rule Results In Confusion Not Clarification

Finally, whether or not Respondent's rights were technically violated, suppression is not the proper remedy. The rule adopted by the Michigan Supreme Court is an "[i]ndiscriminate application of the exclusionary rule," that has already "generat[ed] disrespect for the law and the administration of justice." *United States v Leon,* — US —; 104 SCt 3405, 3413. The purpose of the exclusionary rule is to deter police conduct which violates the constitutional rights of a criminal defendant. The rule should not be applied where deterence cannot be thereby achieved. *Leon, supra,* — US —; 104 SCt at 3413-3414.

The "good faith" exception to the exclusionary rule now applied to Fourth Amendment cases is the natural extension of this court's pursuit of "bright line" rules for the establishment of when constitutional rights attach and police conduct is controlled. *Edwards* itself is a "bright line" rule case in that a specific event, a request for counsel made *TO POLICE* during custodial interrogation, controls police conduct. The rule argued for by Petitioner results in the same "bright line" as that in *Edwards.*

The rule proposed by the Michigan Supreme Court is not a "bright line", it is a "black hole". Common to both the "good faith" rule of *Leon* and the "bright line" rules of *Edwards* and *Berkemer v McCarty, supra,* is that the event which controls police conduct occurs in the presence of the police (be it the facial validity of a search warrant, the request for counsel made to police, or the placing of one in custody by an objective act) and thus the police have all the necessary information for the determination of appropriate self-conduct. The Michigan Supreme Court's rule, contrary to this, punishes police conduct on the basis of events which occur outside their presence, (i.e. a request for counsel made to a judicial officer). In this county at least, neither police nor prosecutor are typically present at the initial arraignment. Prisoners are brought to the courtroom by court officers who receive prisoners from the tunnel lock-up which connects the Jail and the Courthouse buildings. Simply put, the police are not major actors in the events which occur in the courtroom and often are not present. Police would be left to guesswork in determining whether it is proper to interview a particular prisoner under the Michigan Supreme Court's rule. Such a rule would result in sup-

pression of evidence in the most innocent of circumstances where, in the words of Justice Cardozo, "the constable . . . blundered". *People v DeFore,* 242 NY 13, 21; 150 NE 585, 587 (1926). *United States v Henry,* 447 US at 275. Adoption of the Michigan court's rule by this court would result in the spread of the disrespect for the law and the administration of justice already engendered by this rule.

CONCLUSION AND RELIEF

Confessions, voluntarily made, are relevant and probative evidence. This court said in *Oregon v Elstad,* supra, "voluntary statements 'remain a proper element of law enforcement.' *Miranda v Arizona,* 384 US at 478. 'Indeed, far from being prohibited by the constitution, admission of guilt by wrongdoers, if not coerced, are inherently desirable . . .' " *Oregon v Elstad,* — US —; 105 SCt 1285, 1291.

Respondent was acting as a free moral agent both when he murdered the three innocent trainmen at the Jackson Depot and when he confessed. True freedom, in our society, combines the freedom to act and the responsibility for those actions. Respondent is responsible for the murders and should suffer the consequences of his actions. The balance of fundamental interests embodied in the lasting principles of our constitution requires admissibility of Respondent's confession made after a knowing, intelligent and voluntary waiver of his constitutional rights. This guilty defendant ought not go free.

WHEREFORE, Petitioner respectfully requests that this Honorable Court reverse the judgment of the Michigan Supreme Court and affirm Respondent's conviction.

Respectfully submitted,

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